



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Fil-Coil Company, Inc.

File: B-231768

Date: October 18, 1988

DIGEST

Noncompetitive brand name only procurement is not objectionable where agency reasonably determined that only one source could furnish the required radio frequency interference filters because that source holds the proprietary information necessary to develop a technical data package for use in a competitive procurement.

DECISION

Fil-Coil Company, Inc., protests the award of any contract under invitation for bids (IFB) No. F48608-88-B-0009, issued by the Department of the Air Force, Warren Air Force Base (AFB), for brand name only radio frequency interference (RFI) filters. The filters, which filter electrical impulses and surges, are used by the Air Force in the Minuteman Missile Control System. Fil-Coil argues that use of a brand name only IFB violates the Competition in Contracting Act of 1984 (CICA) and results in a sole-source procurement.

We deny the protest.

On May 1, 1988, the contracting officer determined that these filters should be acquired on a brand name only basis. Accordingly, on May 2, he submitted a synopsis to the Commerce Business Daily (CBD) for publication of the agency's intention to procure varying quantities of RFI filters manufactured by Filtron Manufacturing Company, Inc., brand name only. Thereafter, with the concurrence of the agency's competition advocate, the contracting officer executed a justification for other than full and open competition, based on 10 U.S.C. § 2304(c)(1) (Supp. IV 1986), which provides, as pertinent here, that a military agency may use other than competitive procedures when the needed items are available from only one responsible source

C43577 / 137084

and no other items will satisfy the agency's needs. The justification states that the agency does not have a technical data package on the needed items since the data was held by Filtron as proprietary to that firm. The Air Force issued the IFB on May 27 with bid opening scheduled for June 27. Five bids were received by that date; however, bid opening has been postponed pending resolution of the instant protest.

Filtron challenges the agency's use of a brand name only specification arguing that it violates the Air Force's obligation under CICA to obtain full and open competition. The protester alleges that the Office of Competition Advocate, in existence for 3 years, had adequate time to develop a technical data package for the design of alternate RFI filters which would be equivalent to Filtron's. Although no manufacturing drawings are available, Fil-Coil maintains that it could successfully reverse engineer and immediately produce these filters as a competitor, if the Air Force "[w]ould lend the physical unit to Fil-Coil." The protester further argues that the agency should have solicited competitive proposals instead of sealed bids because all other prospective bidders are distributors of Filtron and their bid prices could therefore be controlled by Filtron. According to the protester, if competitive proposals were solicited, the Air Force could negotiate a reasonable price and perform a cost analysis of Filtron's costs.

The Air Force reports that the procurement was a one time replacement purchase of varying quantities of three different designs of RFI filters all of which were developed by Filtron. According to the Air Force, the IFB was issued on a restricted basis because the agency did not have a technical data package defining the form, fit or function requirements for the filters and replacement filters from other manufacturers would not be compatible. The agency maintains that compatibility is essential to the safe, dependable and effective operation of its arsenal of nuclear weapons.

Furthermore, the Air Force states that the items are urgently needed because the filters have been identified as crucial to the overall missile alert readiness at Warren AFB. The agency further states that the time necessary to develop an alternate RFI filter (approximately 9 to 12 months to design, reverse engineer, evaluate, validate and test) would adversely affect the agency's ability to return the missiles to an operational condition.

In comments on the agency report, Fil-Coil disagrees with the Air Force's position that testing and approval of an equivalent filter would take several months. According to the protester, the firm possesses all of the electrical parameters for the filters and could reverse engineer, produce and test the filters within 30 days. Furthermore, notes Fil-Coil, the "sudden rush" to procure replacement filters noncompetitively is inconsistent, with the approximately 10 years, since the original filters were designed by Filtron for the Air Force to obtain an alternate source of supply for these items.

Although the CICA requires competition in government contracting, the act recognizes an exception which permits a military agency to use noncompetitive procedures to procure needed supplies where it determines its need for these supplies are available from only one responsible source and no other supplies will satisfy its needs. Id. As the Air Force correctly points out, where as here, an agency has substantially complied with the procedural requirements of CICA, 10 U.S.C. § 2304(f), calling for the written justification for and higher-level approval of the contemplated sole-source action and publication of the requisite CBD notice, we will not object to the agency's determination to conduct a sole-source procurement unless that decision is shown to be unreasonable. See Pacific Sky Supply, Inc., B-227113, Aug. 24, 1987, 87-2 CPD ¶ 198.

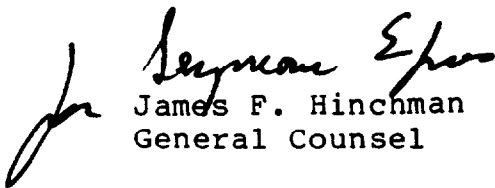
Here, the record shows two principal grounds for the Air Force's decision to restrict the procurement to brand name only. Specifically, the Air Force states that since the RFI filters are proprietary to Filtron, it lacks the technical data necessary to define, evaluate and test an alternate RFI filter and cannot therefore prepare salient characteristics for use in a competitive procurement nor determine the equivalency and technicability of any substitute filter that may be offered. In addition, the contracting officer determined that compatibility of the replacement filters is essential to the agency's needs. As the Air Force explains, these filters are used in the electrical surge arrester vault of the Minuteman missiles to filter noise and radio interferences which could interfere with the launch procedures and make the nuclear force inoperative. In view of these compatibility concerns and the lack of a technical data, we believe it is reasonable for the Air Force to restrict the competition to a single source of supply. See C&S Antennas, Inc., B-224549, Feb. 13, 1987, 66 Comp. Gen. _____, 87-1 CPD ¶ 161. We also note that to the extent Fil-Coil contends that a lack of advance planning unreasonably denied the protester an opportunity to compete for the award, the protester has not shown that it would be

feasible for the Air Force to develop a competitive technical data package.

With regard to the protester's challenge to the Air Force's decision to solicit sealed bids, we find no support for the protester's contention that competitive proposals should have been solicited. As the Air Force states, it decided to use the sealed bid solicitation procedures because award will be based on price and price related factors and the contracting officer expected to receive several sealed bids based on prior procurement history for these items. Notwithstanding the protester's arguments to the contrary, CICA requires agencies to solicit sealed bids only if, among other factors, award will be based on lowest price as determined under the solicitation's evaluation factors. See 10 U.S.C. § 2304(a)(2). We believe the Air Force was required to solicit sealed bids since, in this case, the IFB provides that award will be made to the low responsive responsible bidder and there was a reasonable expectation of receiving more than one sealed bid. Cf. ARO Corp., B-227055, Aug. 17, 1987, 66 Comp. Gen. _____, 87-2 CPD ¶ 165.

Fil-Coil also protests that the quantity of filters being purchased exceeds the quantity ordinarily purchased by a support activity. The agency replies that the quantities being acquired reflects the actual minimum needs of the Operational Contracting Division at Warren AFB, which issued the IFB, to update the missiles located at that AFB. Since the protester has not responded to the agency report on this issue, we consider it abandoned. See Suddath Moving Systems, Inc., B-229992, Apr. 1, 1988, 88-1 CPD ¶ 332.

Accordingly, the protest is denied.


James F. Hinchman
General Counsel